No. 12795

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALI RASCHID, named in the Indictment as RUDOLPH LA MARR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

MILLER & SINCLAIR,
LOREN MILLER and
HAROLD J. SINCLAIR,
407 Stimson Building,
129 West Third Street,
Los Angeles 13, California,
Attorneys for Appellant.

JACOB S. KALINA,
Seattle, Washington,
Of Counsel.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 12795

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALI RASCHID, named in the Indictment as RUDOLPH LA MARR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

THE PLEADINGS.

Appellant Ali Raschid,[1] who was named in the indictment as Rudolph La Marr, was indicted in the United States District Court, District of Washington, Northern Division, in an indictment filed July 13, 1950 [R. pp. 3 and 4] charging him in two counts with violations of Section 2423, Title 18, U. S. C., and Section 2422, Title 18, U. S. C. [R. pp. 3, 4]. In Count I, it was charged in substance that he did knowingly and unlawfully, per-

---

[1]Appellant had obtained an appropriate decree in the Supreme Court of Cook County, Illinois, changing his name [R. p. 13].

suade, induce and entice one Enola McMath, a female under 18, to go by common carrier from Seattle, Washington, to Portland, Oregon, with the intent that she be induced to engage in prostitution and debauchery in the latter city [R. p. 3]. In Count II it was charged that he did knowingly and unlawfully persuade, induce and entice Beverly June Allen, a female, to go by common carrier from Seattle, Washington, to Portland, Oregon, with the intent that she be induced to engage in the practice of prostitution and debauchery in the latter city [R. pp. 3, 4].

Issue was joined on a plea of not guilty to both counts and the cause was tried to a jury, before the Honorable John C. Bowen, District Judge, in the above mentioned district, on October 17 and 18, 1950 [R. p. 23]. The cause was tried on October 17 and 18, 1950, and on October 18, 1950, the jury returned its verdict of guilty on both counts [R. p. 10]. Judgment of conviction and sentence was signed and entered on October 30, 1950, sentencing Appellant to serve five years on each count, sentences to run concurrently and to pay a fine of one thousand dollars on Count I [R. pp. 14, 15].

On November 3, 1950, Appellant filed notice of appeal [R. pp. 16, 17]. On December 27, 1950, Appellant filed his Designation of Points on Appeal [R. pp. 126-129] and on December 27, 1950, filed his Designation of Contents of Record on Appeal [R. p. 130].

The Government requested instructions [R. pp. 4-9]; the record discloses no request for instructions by Appellant and the Court gave the instructions as set forth in R. pp. 102-119, to which no exceptions were noted

[R. p. 119]. (As will be noted hereafter, Appellant makes no claim of error predicated on the instructions.)

At the close of the government's case, Appellant by oral motion made in open court challenged the legal sufficiency of the government's evidence to sustain the charge on either count, moved for a dismissal, or in the alternative requested a directed verdict of not guilty [R. p. 77]. The challenge was overruled and the motion for directed verdict and for dismissal was denied as to both counts [R. p. 81]. Exception was taken and allowed to the rulings [R. p. 82]. Appellant thereupon rested and renewed his motions as of the close of the trial [R. p. 82, 83]. Exception was duly taken and allowed [R. p. 83].

On October 20, 1950, Appellant filed his Motion for Acquittal and in the Alternative for a New Trial [R. pp. 11, 12]. The Motion was denied as to each request and an order setting forth such denial was signed and entered on October 30, 1951 [R. p. 17].

The Facts.

Enola McMath, the female involved in Count I, testified in direct examination that she was sixteen years old in May, 1950, had been married and was the mother of a nineteen months old child at the time of the trial [R. p. 29]. She met Appellant at a night club in Seattle through an introduction by her sister Beverly June Allen (the female involved in Count II) in April or May of 1950 [R. p. 29]. She was planning on changing her job and was told by Appellant that there was more work in Portland [R. p. 31]. Appellant "didn't mention any purpose" for their going to Portland, "just that he thought we would like it down there" [R. p. 31]. Appellant made

arrangements to meet Enola McMath "in the train depot" and gave her and her sister money for her train fare to Portland the next day after the conversation [R. p. 32]. He gave them the name of two hotels at which they could stop in Portland; they chose the Carroll Hotel [R. p. 32] and hotel records showed they registered at the hotel on May 25, 1950 [R. p. 25], Mrs. McMath as Germain Pica. Appellant did not contact Mrs. McMath in Portland but she contacted him and, with her sister, met him at McCleod's Club [R. p. 34]. Appellant was told "where we were staying . . . We didn't do anything. We sat there and talked with him and that was about all" [R. p. 34]. On a subsequent evening she again met Appellant, with her sister, at the same club and "we were talking about working and he asked us if we had looked for any jobs. We had looked for a couple and something had come up where they had been taken, and we hadn't found any, and he asked us if we had enough money and at that time we had enough. . . ." [R. p. 35]. Subsequently she met Appellant at Rowland Hotel and "the thing that occurred, we had sexual intercourse" [R. p. 36]. She had sexual relations with Appellant because she was "afraid" [R. p. 37 and she was "afraid" because "before the time I left Seattle, he had called the house and wanted to see me. He said that he would come down to work and pick me up, that he wanted to talk to me, and I said no, that I didn't want to see him. He said that if I had any plans to see anyone else or had made plans, just to forget about them, and if I didn't see him he would come in and make a scene and drag me out of there. He didn't mean bodily, I don't imagine, but I thought he would create a scene, so I didn't go back to work that day" [R. p. 38]. Appellant had sexual intercourse with her "just this one occa-

sion at the Rowland Hotel that afternoon, and the second occasion was one evening after we had been to the club, we went there" [R. p. 38]. She asked Appellant for some money when she was "leaving for Seattle and I had asked Rudy for some money. I had told him I needed some money and he had given it to me" [R. p. 38]. He gave her $70.00 [R. p. 38].

On cross-examination, she testified that "he hadn't ever threatened me bodily, with bodily harm, down at the club when I saw him there" [R. p. 43] and referred to the telephone conversation as the only "threat" ever made [R. p. 43]. She wasn't afraid of him at the time she went to Portland [R. p. 43]. The "main reason for borrowing (the money). I told him I had to come back to pay my baby's board and a few other things I had to pay" [R. p. 44]. Appellant never went to her hotel to see her [R. p. 45]. She never gave Appellant any money [R. p. 48] and she told Appellant she wanted to go to Portland to engage in legitimate work [R. p. 47]. She never suggested that she wanted to engage in prostitution and there is no testimony, direct or indirect, that Appellant ever suggested or talked about prostitution with her.

Beverly June Allen, the female, involved in Count II, testified on direct examination that she was nineteen years old at the time of trial and that she met Appellant at the Sessions Club in Seattle [R. p. 51]. She saw him at the same club a month or so later and "he just wanted to know if I wanted to become a prostitute" [R. p. 53] and she answered "No" [R. p. 53]; that she had no conversation prior to going to Portland about prostitution [R. p. 53]. "Well, we were just going up there to look for work" [R. p. 54]. She stayed at Carroll Hotel in Portland with her sister [R. p. 55] after the

Appellant and she had ridden on the same train but in different coaches to Portland at the suggestion of Appellant [R. p. 54]. She saw Appellant at McLeod's Club in Portland but there was no significant conversation [R. p. 56]. That some time in June she saw Appellant at his quarters in Portland and "Well, he just wanted to know if I wanted to become a prostitute" [R. p. 57]; that she said "No" and did not become a prostitute [R. p. 57].

After direct examination had closed the District Attorney sought and was granted permission to re-open his inquiry on the ground that he had further testimony to elicit. The following occurred [R. pp. 58, 59]:

"By Mr. Belcher:

Q. Directing your attention to last Friday, the month of October, did you see the defendant? A. Friday? No.

Q. Did you see him at any time prior to this trial? A. I saw him Sunday night.

Q. Where?

Mr. Beardslee: That is objected to as immaterial, if Your Honor plea.

The Court: What is the purpose?

Mr. Belcher: The purpose is to show the conversation that he had with her concerning this trial.

The Court: The objection is overruled.

Q. Did you have a conversation with the defendant at that time? A. Yes.

Q. What did he say to you? A. Well, he was talking about the trial and he was in a round about way trying to tell me how I would tell—

Mr. Beardslee: Just a minute, a round about way, he was trying to, I think the witness should be confined.

The Court: The objection is sustained. It is permissible for you to say in substance that he said. If you can recall his words, you should state his words. If you cannot recall the exact words, it is permissible for you to state the substance of what he said.

The Witness: Well, he was telling me how I could—well, I don't know how to put the words.

Q. In substance what did he say to you? A. Well, to deny everything I had said before.

Q. Did you tell him that you had been interviewed by special agents of the Federal Bureau of Investigation? A. No.

Q. What was it he wanted you to deny? A. He didn't want me to—he was just bringing it up, I mean.

Q. What? A. He was trying to tell me if I—

Mr. Beardslee: If Your Honor please—

The Court: You will have to say what he said or the substance and effect of what he said, if you say anything with reference to the conversation. Read the last question.

The Witness: Everything that I have said before—

Q. To whom? A. To the F. B. I. man.

Q. What else did he say? A. That's all.

Mr. Belcher: You may inquire.

By Mr. Beardslee:

Q. Did he accuse you of having been lying? A. No.

Q. Didn't he say you had lied about him? A. He just told me he didn't want me to lie."

On cross-examination, Beverly June Allen testified that she had been married, was divorced and the mother of a twenty two months old child [R. p. 61]; that she was not employed. She told Appellant she was going to Portland to look for "legitimate work" [R. p. 62] and that she didn't look for work as a prostitute in Portland [R. p. 62]. She introduced her sister to Appellant [R. p. 63] and that Appellant asked her and her sister if they had been trying to find legitimate work in Portland [R. p. 65].

Mrs. Rose Ferguson testified that she was the mother of the girls; that she had conversations with Appellant as to where they were and that he told her if he found them he would send them home [R. pp. 71, 72, 73].

Carrie L. Ruthman, proprietor of the Carroll Hotel, testified that Appellant had talked to her "several days" after the girls left her hotel (because of her objection to their drinking beer in a man guest's room), and told her their mother was seeking them [R. pp. 69, 70].

George D. Daugherty testified that he was assistant manager of the Hotel Washington, Portland; that the two complaining witnesses registered at his hotel on June 1, 1950, and that about June 8, 9, or 10—three to five days after they left—Appellant made inquiries about them on behalf of their mother [R. pp. 74, 75, 76].

All witnesses were produced by the Government.

Appellant offered no testimony on his own behalf.

The evidence has been set forth at what may be regarded as unseemly length because, as will appear, one of the critical questions here is whether there was substantial evidence to justify the conviction and whether the Court erred in denying motions for acquittal.

Abstract of Statement of Case Presenting the Questions Involved and the Manner in Which They Are Raised.

I.

As appears from the statement of pleadings and facts, support for the verdict on Count I must be found in the testimony of Enola McMath herself who testified positively that Appellant never mentioned prostitution to her either in Seattle or Portland. There is absolutely no evidence as to any sexual relations, or mention of sexual relations, by Appellant in Seattle. She did testify as to one, possibly two, sexual episodes in Portland after she had sought out Appellant. She gave him no money and he voluntarily gave her money to return to Seattle when she made the request in Portland. Appellant will show that the District Court erred in denying motions for acquittal, for a directed verdict and the challenge as to the sufficiency of the evidence under the First, Second and Third Specifications of Error [R. p. 128] as to Count I of the indictment.

For the reasons of the insufficiency of the evidence as set forth in the preceding paragraph, Appellant will show that the District Court erred in denying Appellant's motion for a new trial as set forth in the Fifth and Sixth Specifications of Error [R. pp. 128, 129].

As appears from the statement of pleadings and facts, support for the verdict as to Count II must be found in the testimony of Beverly June Allen who testified positively that she had never had any sexual relations with

Appellant. The record is silent as to any hint that he ever sought sexual relations with her either in Portland or Seattle, or that he ever sought or solicited her to have sexual relations with any other person at any specified place or time. The only testimony even tending to connect him with the crime charged is that he asked her, once in Seattle and once in Portland, if she wanted to become a prostitute. There is no testimony, either direct or indirect, that he ever gave her, or solicited from her, any money or funds on any occasion. Appellant will show that the District Court erred in denying motions for acquittal, for a directed verdict and the challenge as to the sufficiency of the evidence under the First, Second and Third Specifications of Error [R. p. 128] as to Count II of the indictment.

For the reasons of the insufficiency of the evidence as set forth in the preceding paragraph, Appellant will show that the District Court erred in denying Appellant's motion for a new trial as set forth in the Fifth and Sixth Specifications of Error [R. pp. 128, 129].

Obviously, the questions involved in the First, Second, Third, Fifth and Sixth Specifications of Error are interrelated, both as to Counts I and II, and will be considered under the general proposition of: *Insufficiency of the Evidence.*

II.

The same question pertains to both Counts under the Fourth Specification of Error [R. p. 128]. Both Counts will be considered together under the head of Misconduct

of the District Attorney. The District Attorney's argument is found on pages 84 to 90 and from pages 100 to 102 of the Record. The Fourth Specification of Error sets forth that Appellant was deprived of a fair trial by reason of the District Attorney's comment on the failure of Appellant to take the witness stand. In his argument, the District Attorney made these references to the matter:

> The undisputed evidence is that prior to the transportation the defendant himself told them the hotel at which they should register [R. p. 87].
>
> The girl has told you that she did not engage in prostitution either here in the City of Seattle or in the State of Oregon but there is no evidence to contradict or controvert her statement that that proposition was made to her in the City of Seattle and again made to her after she arrived in Portland at his expense. I don't know what further evidence any jury requires in this type of case [R. pp. 88, 89].
>
> Is there anything here to refute the story of these girls [R. p. 89]?
>
> He is not known as a philanthropist, at least, there is no testimony here to that effect [R. p. 101].
>
> They don't deny in this record that he paid the transportation. That in itself, coupled with the other facts, shows what his intent was, and I say that a person is very gullible who cannot conclude that that was the intent of this defendant in this case [R. p. 101].

No objection was made and no exception was taken to any of these statements by Appellant's counsel but we will show that, in the context of this case, prejudicial error nonetheless resulted of which this Court should take cognizance.

III.

The evidence admitted which forms the basis of the claim of error under the Seventh Specification of Error has heretofore been set forth on page ..... of this brief. Appellant will show that this evidence was immaterial, under the theory set forth by the Government, and that, in the context of this case, it was inflammatory and calculated to result in serious prejudice to the Appellant. This point will be considered under the heading: *Admission of Evidence Claimed Prejudicial.*

No specific claim of error will be advanced as to the Eighth Specification of Error—but Appellant will comment on statement of the District Attorney in his argument to the jury that "no man, white or black, is giving a woman $105—unless he expects something in return" [R. p. 100] in connection with the racial undercurrents in this case and in reference to the whole question of the fairness of the trial.

SPECIFICATION OF ERRORS RELIED UPON.

I.

The Insufficiency of the Evidence.

(A) The District Court erred in denying Appellant's Motion for a Directed Verdict and for a verdict of Acquittal at the close of the Government's case and at the close of the case in full. Appellant's motion, urged as to both Counts, as the close of the Government's case is found on pages 77, 78 and 79 of the Record, and the Court's denial of the motion is found on page 81 of the Record. The motion was renewed at the close of the case as shown on page 83 of the Record.

(B) The District Court erred in denying Appellant's Motion for a New Trial or in the Alternative for Acquittal. Appellant's motion was made as to both Counts and is found on page 11 of the Record.

II.

Misconduct of the District Attorney.

Claimed misconduct of the District Attorney will be based on statements heretofore set out in *haec verba* in the Abstract of the Case and are found on pages 87, 88, 89, and 101 of the Record.

III.

Admission of Evidence Claimed Prejudicial.

Error will be shown in admission of evidence as to a purported conversation of Beverly June Allen after the alleged crime and prior to the trial of this cause. The substance of the evidence admitted was that Appellant talked to the witness about the trial, that he had asked her to testify in a particular manner, first referred to by

the witness as "to deny everything that I had said before" and later "He just told me he didn't want me to lie." Objection was made that the evidence as to what was said "prior to this trial" was immaterial [R. p. 58]. The objection was overruled upon the District Attorney's representation that "The purpose is to show the conversation that he had with her concerning this trial" [R. p. 58]. The full testimony elicited is found on pages 58, 59 and 60 of the record and is set forth in this Brief in full on pages 6 and 7.

ARGUMENT OF THE CASE.

Summary.

Justification for conviction under the White Slave Act, as charged here, must rest upon proof that the intent was conceived *before* the journey was undertaken. In this type of case, as in all criminal prosecutions, the burden rests on the Government to prove its case beyond a reasonable doubt and the question of guilt or innocence should not be left to conjecture or surmise. By proper motions, seasonably made, Appellant requested the Court to instruct the jury to acquit [R. pp. 77, 78, 79] and by renewal of that motion after the case had closed [R. p. 83] preserved the right to move for acquittal or in the alternative for a new trial after the verdict. He did move for such acquittal or alternatively for a new trial [R. p. 11] and in each instance the motions were denied. Unless there was substantial evidence of facts which excluded every hypothesis but that of guilt it was the duty of the trial judge to instruct the jury to return a verdict

for the accused. Clearly, the facts in this case could not and did not, by any construction, exclude every hypothesis but that of guilt. In truth, those facts were as clearly compatible with innocence as with guilt. There is absolutely nothing in the record to prove, or that tends to prove, that any criminal intent was formed as to Counts I or II and there is a total lack of any evidence of inducement, persuasion or enticement to undertake the journey under either Count.

Comment on the failure of the Appellant to testify in this case was particularly harmful in view of the closeness of the questions involved. The comments that were made were made after a conference in the Court's chambers in which both counsel participated. In light of that conference, counsel for Appellant forebore to make any remarks on the subject, or to try to explain why Appellant did not take the stand. The fact that the references that there were made by the District Attorney were indirect does not cure their vice. In the context of this case references to the failure to "anything to refute the story of these girls"; "he is not a philanthropist," at least, there is no testimony to that effect and "they don't deny in this record that he paid the transportation" could be understood by the jury as only references to the failure of the Appellant to take the witness stand. As we will show, indirect references to failure to testify are forbidden and the reviewing Court must look at the whole record to determine the effect of particular claimed errors.

It is hard to understand the theory under which the Court admitted conversation allegedly had between Appel-

lant and the witness Beverly June Allen, "prior to the trial." If they were intended as admissions or confessions of guilt they fell far short of the mark. The whole matter finally wound up as a farce when the witness testified that Appellant "Just told me he didn't want me to lie" but before she had given that testimony she had (either through or ineptness or with an intent to convey an attempt to induce her to change her testimony) tried to give off the impression that she had been asked to change her testimony. Here again, the error may seem trivial but in this case, where the issues were close, it could do inestimable damage to Appellant.

The record does not disclose it but Appellant here is a Negro. The complaining witnesses were white persons. All of us are aware of the deep seated prejudices that lurk beneath the surface where interracial sexual relations are involved, particularly between Negro males and white females. The District Attorney lost no time in seeking to have the complaining witness identify the club where the parties met as a "colored club" [R. p. 30]. He moved quickly to ask a leading question as to another club "It is the Colored Elks Club?" [R. p. 31.] In his argument to the jury, the District Attorney remarked that "no man, white or black, is giving a woman $105" [R. p. 100]. Admittedly, there is no specific error to which Appellant can point in this latter aspect of the case. It is but one of the circumstances that the Court must look into in determining whether Appellant had that fair trial to which he is entitled, no matter what view is taken of his conduct.

I.

Argument as to Insufficiency of Evidence.

The law in this type of case is not obscure. It is epitomized in the following holdings:

> "That the journey from one state to another is followed by illicit intercourse does not result in violation of the White Slave Traffic Act, where the journey was made for wholly different reasons . . . Intent is essential to violation . . .
>
> "To justify conviction there should be *convincing evidence of the intention to transport the woman for immoral purposes and that it was formed before* the woman reached the state to which she was transported. If the intention referred to did not exist before the woman reached the state to which she was being transported, but was formed after reaching the state in which illicit relationship is had, conviction under the Act cannot be had." (Italics ours.)
>
> *Alpert v. U. S.,* 12 F. 2d 352, 354.

> ". . . It has been held that the transportation denounced must have for its *object,* or be a means of effecting or facilitating the sexual intercourse of the participants. If the *purpose* of the journey is not sexual intercourse, *though that be contemplated,* the statute is not violated." (Italics ours.)
>
> *Harrison v. Hoff,* 291 U. S. 559, 563.

> "An intention that the women or girls shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that

> necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act."
>
> *Mortensen v. U. S.,* 332 U. S. 375.

And even the *Cleveland* case which is often pointed to as qualifying the rule in *Mortensen*:

> "Guilt under the Mann Act turns on the *purpose which motivates the transportation,* . . ."
>
> *Cleveland v. U. S.,* 329 U. S. 14, 20.

The sufficiency of the evidence as to Count I must be weighed in the scales provided in this case. What evidence is there anywhere in record to show the existence of the critical intent formed before the journey was undertaken? Construed most favorably to the Government, as it must be, it shows absolutely nothing beyond one, or perhaps two, instances of sexual intercourse in Portland. The Government's witness, Enola McMath, herseld testified that the journey was undertaken to secure employment, and that she looked for employment in Portland. Certainly, it cannot be said that she was solicited in Seattle or in Portland to engage in prostitution.

The case must rest or fall on the fact that there were these one or two acts of sexual intercourse in Portland and that therefore she was persuaded, induced and enticed to go there for the purpose of "debauchery." But where is the evidence of the intent to make the journey to embark on debauchery? The Court correctly instructed the jury tlhat "the term debauchery as used in the indictment means that the woman in question is to be subjected repeatedly to unlawful sexual intercourse, fornication or adultery, or unlawful indulgence of lust" [R. p. 113]. The evidence shows that when the witness wished

to return to Seattle she solicited and was given funds by defendant to return to that city. That direct testimony negatives any suggestion or suspicion that she was to be subjected to "debauchery" as that term was defined by the Court or even if it was to be given that wider definition sought by the Government in its proposed instruction [R. p. 8] that it "means vicious indulgence in sensual pleasures, or excessive indulgence in sensual pleasures of any kind, gluttony, intemperance, sexual immorality, unlawful indulgence of lust." The evidence, showing at best two acts of sexual intercourse, coupled with a readiness to provide funds for her return to Seattle, does not prove the critical intent.

True enough, there was some testimony by Enola McMath that she entertained some fear of Appellant. That fear is made to turn on evidence so flimsy that it cannot be dignified as substantial. She denied any force or threats of force by Appellant and rested her case on a telephone conversation which she said caused her to stay away from work one day, apparently on the theory that his conduct might cause her some embarrassment [R. p. 37] through making a "scene" [R. p. 37].

This was the state of the record when Appellant's motions for a directed verdict and for acquittal were made, as to Count I. The Court's duty was to look at the record and:

> "Unless there is substantial evidence of facts which exclude every hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all of the substantial evidence is as consistent with innocence as

with guilt it is the duty of the appellate court reverse a judgment against him."

Hammond v. U. S., 127 F. 2d 752, 753.

A fair assessment of the state of the record when the motions were made compels the conclusion that there were absolutely no facts, let alone substantial facts, that excluded every hypothesis but that of guilt as to Count I. The trial court's duty was plain; he should have instructed a verdict of not guilty.

Nor is the rule here contended for a vagrant announcement of one court. To the same effect see:

Gargotta v. U. S., 8 Cir. 1935, 77 F. 2d 977;
Nicola v. U. S., 3 Cir. 1933, 72 F. 2d 780;
Grant v. U. S., 3 Cir. 1931, 49 F. 2d 118;
Graceffo v. U. S., 3 Cir. 1936, 46 F. 2d 852;
Parnell v. U. S., 10 Cir. 1933, 64 F. 2d 324;
Leslie v. U. S., 10 Cir. 1930, 43 F. 2d 288;
Nosowitz v. U. S., 2 Cir. 1922, 282 Fed. 572.

And if it seems to cast a large burden on the prosecution it is well to remember that it is no more restrictive than the rule in civil cases that where:

"proven facts give equal support to each of two inconsistent inferences . . . neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recovery."

Pa. R. R. v. Chamberlain, 288 U. S. 333, 330.

Here Appellant, clothed as he was with the presumption of innocence, was entitled to demand, as a matter of law, that before his case went to the jury the Government be required to produce facts excluding every other reasonable hypothesis but that of guilt. That the Government did not do. Judgment as a matter of law should have gone against it, burdened as it was with justifying the inference of guilt as against the presumption of innocence attached to Appellant.

The same issue as to insufficiency of the evidence had been preserved for the trial judge in light of the seasonable motions made by Appellant and that issue was presented by the Motion for Acquittal and in the Alternative for a New Trial, and is properly before this Court.

This Court will not, of course, weigh the evidence on this appeal. But:

> "In an appellate Court, the question of the sufficiency of the evidence is a matter of law which calls for an examination of the record, not for the purpose of weighing conflicting evidence but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict."
>
> *Hemphill v. U. S.,* 9 Cir., 120 F. 2d 115, 117.

Cf.:

> *May v. U. S.,* 175 F. 2d, 944.

Nor is this Court's duty diminished by the fact that the trial judge had denied a motion for a new trial.

> "While the Circuit Court of Appeals accords weight to the rule that makes the jury the sole judges of the facts in criminal cases and the fact that the trial court did not set aside the verdict as contrary to the evidence the Court is nevertheless weighted with the responsibility of examining all the evidence to ascertain whether there is substantial proof of the defendant's guilt of the crime charged."
>
> *Wise v. U. S.,* 108 F. 2d 379.

Appellant is mindful of the often stated rule that:

> "A judgment of conviction must be affirmed, if, taking the view most favorable to the government, there is substantial evidence to support the verdict."
>
> *Sipe v. U. S.,* 150 F. 2d 984.

But here the question is really a much narrowed one in which this Court is urged to determine the issue of whether there was any competent and substantial evidence which warranted the case in going to the jury. Under the law as set forth in *Hammond v. U. S., supra,* it is the duty of this Court to reverse the judgment.[2]

No purpose would be served in repeating authorities just examined in making an argument in respect of

---

[2]The rule has been criticized by the Court announcing it in the *Hammond* case and some limitations suggested as to its applicability *Cf. Curley v. U. S.,* 160 F. 2d 229, 232.

Count II. If anything, the evidence upon which conviction rests in the latter Count is more flimsy than that proffered in respect of Count I. Admittedly, there were no sexual relations between Appellant and Beverly June Allen in Seattle or in Portland. The record is barren of any suggestion that any attempts were made at such intercourse. Similarly there is not the faintest evidence of any specific attampt by Appellant to persuade, induce or entice Mrs. Allen to engage in any act of sexual intercourse with any specific person, in Seattle or in Portland.

The Government's case, such as it is, must rest on the asserted inquiries made to her, before and after going to Portland, as to whether or not she "wanted" to be a prostitute. The witness testified that on each occasion she answered "No" as to such inquiries and there is no evidence that the matter, assuming it to have been broached, was ever pursued on any such occasion, or that any persuasion, inducement, or enticement was attempted. There is absolutely no evidence as to any inducement, enticement or persuasion for her to undertake the journey in interstate commerce. In light of the witness' negative answer to the initial inquiry, made in Seattle, as to the question as to whether she "wanted" to become a prostitute it is hard to see how any question of formation of the intent, critical to this prosecution, could have arisen for submission to the jury.

Tested by the applicable law, as heretofore set forth, there was *no evidence* that could possibly justify submitting the case to the jury.

II.

Argument as to Misconduct of District Attorney.

Comment on the failure of a defendant to take the witness stand is, of course, forbidden. And such comment is interdicted whether direct or indirect:

> "Under Constitutional Amendments, and [applicable statutes] government's counsel cannot comment on defendant's failure to become a witness in his own behalf, even by indirect references."
>
> *Rice v. U. S.,* 35 F. 2d 689.

That rule is qualified by the fact that such comment:

> ". . . is only objectionable (when directed to) the failure of defendant personally to testify; and if at the close of the whole case any given point stands uncontradicted such lack of contradiction is a fact, upon which counsel are entirely at liberty to dwell."
>
> *Lefkowitz v. U. S.,* 237 Fed. 664, 668.

And where comment is invited by the statements of defendant's counsel, comment may be made by Government counsel.

There can be no claim in this case that Appellant's counsel invited comment by his statements. He made none.

Admittedly the comments seem, on the surface, to come within the rule of *Lefkowitz v. U. S., supra.* The District Attorney made the following references:

> "The undisputed evidence is that prior to the transportation the defendant himself told them the hotel at which they should register" [R. p. 87].

"The girl has told you she did not engage in prostitution . . . but there is no evidence to contradict or controvert her statement that that proposition was made to her. I don't know what further evidence any jury requires in this type of case" [R. pp. 88, 89].

"Is there anything here to refute the story of these girls?" [R. p. 89.]

"He is not a philanthropist, at least, there is no testimony to that effect" [R. p. 101].

"They don't deny in this record that he paid the transportation. That in itself, coupled with other facts, shows what his intent was . . ." [R. p. 101].

The question as to whether a reference is indirect, or is a comment that any given fact or set of facts stands uncontradicted, or is a comment on the personal failure of the defendant to testify is, more often than not, a semantic one. It is a question that must be resolved in light of the facts and circumstances that surround each particular case. In this case where the comment was upon evidence that could be adduced only by personal testimony of the Appellant himself the referencs could have been understood, and no doubt were understood, only as comments on his personal failure to take the witness stand. Their subtlety does not rob them of their effect; in fact the effects is heightened because they were oblique. Moreover the question as to whether or not the unrebuked comment on failure to testify is a matter of moment in a given trial is one that depends on the closeness of

the issue and the atmosphere that surrounds the trial. Here, where the question was close and where latent racial attitudes might easily have crept into jury's consideration of the case, this Court should exercise more than a usual vigilance to test this kind of comment.

It is quite true that the Court instructed the jury that "you are to draw no inference of guilt against the defendant because he has not testified in his own behalf . . . He is free to testify or not as a witness in his own behalf, but no presumption or inference of guilt is to be indulged by you from his failure to testify" [R. pp. 115-116]. However there is a wide difference in the induced attitude of the jury between a direct and instant statement to disregard a given remark and an admonition sandwiched in lengthy instructions. When the disregarding instruction is given by the Court as soon after utterance as possible it must have far greater psychological effect than a formal statement of law.

It is true, too, that no exception was taken at the time as to any of the statements now complained of. But this Court has it within its power to correct error notwithstanding failure of counsel to make seasonable objection.

See:

Vendetti v. U. S., 45 F. 2d 543.

> "We have the right under our rules, should we choose to exercise it, to notice plain error, unassigned or unnoticed in the trial court, to prevent a miscarriage of justice in an exceptional case, where the error is particularly harmful."

Hemphill v. U. S., 9 Cir., 112 F. 2d 506, 507 (reversed on other grounds).

III.

Argument as to Admission of Evidence Claimed Prejudicial.

After he had concluded direct examination of Beverly June Allen, complaining witness under Count II, the District Attorney asked to reopen his case and upon receiving permission asked the witness [R. p. 58]:

> "Q. Directing your attention to last Friday, the month of October, did you see the defendant? A. Friday? No.
>
> Q. Did you see him at any time prior to this trial? A. I saw him Sunday night.
>
> Q. Where?"

At this point Appellant's counsel interposed the objection that such questions were immaterial. Parenthetically, it must be observed here that the dates under scrutiny were subsequent to the commission of the alleged crimes and that on the surface inquiries regarding them were plainly immaterial. The Court, in response to the objection, inquired as to the purpose of the questions. The following then occurred:

> "Mr. Belcher (District Attorney): The purpose is to show the conversation he had with her concerning this trial.
>
> The Court: The objection is over ruled."

Why or in what manner a conversation had between a defendant and a witness in a trial becomes material simply because it is had "concerning" the trial is puzzling. The objection as to materiality was not vitiated simply because a conversation was "had with her concerning this trial." It might have been of the most trivial kind, concerned with time or place or other minor details. Pre-

sumably, the District Attorney, in his zeal to prosecute wanted to elicit a conversation inimical to the defendant. What he succeeded in doing, through permission of the Court to pursue the inquiry, was to draw from the witness confused and contradictory statements, apparently aimed at discrediting the defendant and certainly harmful to him. She said successively:

> "Well, he was talking about the trial and in a around about way trying to tell me how I would tell—" [R. p. 58].

> "Well, he was telling me how I could—well, I don't know how to put the words" [R. p. 59].

> "Well, to deny everything I had said before" [R. p. 59].

Then when asked:

> "What was it he wanted you to deny? she said 'He didn't want me to—he was just bringing it up' " [R. p. 59].

And finally on cross-examination, the witness said:

> "He just told me he didn't want me to lie" [R. p. 60].

The admission of this immaterial testimony may seem a trivial thing in the course of a trial of this kind. But what was said must be seen in its proper perspective and against the background of the events that transpired at the trial. Plainly, the witness' first answers were deliberately calculated to give the impression that Appellant had sought to induce her to change her testimony, that he had in fact suborned perjury. The Government's whole case as to Count II revolved around statements made, or alleged to have been made, by Appellant to this

witness. Here she was permitted, to take a charitable view of the matter, to make statements on an immaterial issue tending to further discredit Appellant. Her final admission that "He just told me that he didn't want me to lie" [R. p. 60] could hardly undo the mischief done on her direct examination into matters that could neither prove nor disprove any issue in the case, and that were utterly immaterial, unless they partook of the nature or admissions or confessions—something never claimed for them by the District Attorney.

Conclusion.

The complete testimony in this case is found between pages 23 and 76 of the printed record and counsel respectfully urge the Court to read it in its entirety in order to get the full flavor of the case. Such a reading will bear out our contention, we believe, that conviction here rests upon a foundation that does not square with the requirements of due process, a conviction that cannot be sustained in our view without doing violence to cherished principles of law, to the protection of which Appellant was entitled, no matter how reprehensible his conduct may have been in respect of matters irrelevant to this case.

The judgment should be reversed.

Respectively submitted,

MILLER & SINCLAIR,
LOREN MILLER and
HAROLD J. SINCLAIR,
Attorneys for Appellant.

JACOB S. KALINA,
Of Counsel.